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ABSTRACT

This study analyzed the current student drug testing policies of Texas public school districts in the context of the Fourth Amendment rights of students. Court decisions on this issue conflict, and school administrators, attorneys, and other concerned parties may be interested in knowing school districts' policies. Responses were received from 827 of the 1,056 public school districts in Texas. Of these, 169 districts currently had drug testing policies in place, and the majority of policies had been in place for 1 to 5 years. Policies had generally been in place longer in the 12 districts that are state-sponsored schools for juvenile offenders or troubled children. Findings make it clear that the implementation of drug testing policies in Texas school districts increased as a result of the "Veronia" decision in which the U.S. Supreme Court ruled that random suspicionless drug testing of student athletes as a condition for participation in interscholastic athletics did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. In only four districts had there been legal challenges to the drug testing policy. About 10% of Texas districts not currently using drug testing plan to do so at a later date. Two recent court decisions have favored students' rights over the schools' power to require such testing, and it seems likely that challenges of school policies are likely to increase. (SLD)

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Texas Superintendents' Role in Student Fourth Amendment Rights

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Texas Superintendents' Role in Student Fourth Amendment Rights

The Fourth Amendment to the United States Constitution has protected all persons from unreasonable searches and seizures since 1791: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] Recently, however, this protection has been questioned in one very important context – public schools. Does random, suspicionless drug testing of students constitute an unreasonable search, prohibited by the Fourth Amendment? Currently the courts are trying to answer this question.

The United States Supreme Court's 1995 decision in *Vernonia School District 47J v. Acton*[2] held that a school district's random suspicionless drug testing of student athletes as a condition for participation in interscholastic athletics did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. This case noted specific features including student athletes' decreased expectations of privacy, the relative unobtrusiveness of the search procedures, and the seriousness of the need met by this search.[3] Regardless of the procedures, however, this case clearly lowers schools' previous legal search standard[4] of "reasonable suspicion," set forth by the Supreme Court in *New Jersey v. T.L.O*[5] in 1985.

As a result of the *Acton* decision, many school districts nationwide are implementing mandatory drug testing for students (Hawkins, 1999). Not surprisingly, many of these policies have been challenged, with mixed results.[6] These policies are also implemented in response to statistics indicating that drug use

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[1] U.S. Const. Amend. IV

[2] 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

[3] Id.

[4] J.A. Stefkovich & G.M. O'Brien, *Students' fourth amendment rights and school safety: An urban perspective*, 29 Education and Urban Society 149 (1997).

[5] 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

[6] For example, two appellate courts have upheld random, suspicionless drug testing of students who participate in extracurricular activities not limited to athletics. *See Joy v. Penn-Harris-Madison School Corporation*, 212 F.3d 1052 (7th Cir. 2000) (upholding random drug and alcohol testing of students who participate in extracurricular activities and who drive to and from school; invalidating nicotine testing for students who drive to and from school); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 1999 U.S. App. LEXIS 13289 (8th Cir. (Ark.)); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *rehearing with suggestion for rehearing en banc denied*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, 1998 U.S. LEXIS 4938. Cf. *Earls v. Board of Education of Tecumseh Public School District No. 92*, 242 F.3d 1264, 1275 (10th Cir. 2001) (invalidating random drug testing of all students in extracurricular activities, noting that the evidence of drug use among students subjected to testing was "negligible" and thus did not pass the "nature and immediacy of the governmental concern prong of *Vernonia*); *Willis v. Anderson Community School Corporation*, 158 F.3d 415 (7th Cir. 1998) (invalidating drug testing policy applied to those suspended from school for specified disciplinary infractions; *Theodore v. Delaware Valley School District*, 761 A.2d 652 (Pa. Cmnwlth. Ct. 2000) (invalidating drug and alcohol testing policy applied to students participating in extracurricular activities and driving to and from school); *Linke v. Northwestern School Corporation*, 734 N.E.2d 252 (Ind. Ct. App. 2000) (invalidating under state constitution suspicionless drug testing policy applied to student-athletes and those participating in specified extra- and co-curricular activities); *Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (invalidating suspicionless drug testing policy as applied to members of marching band).

among students is rising.[7] In fact, many Texas school districts currently have drug testing policies in place, although no official data are kept on this topic.[8] In fact, two particular cases concerning student drug testing policies in Texas have received national attention[9].

Currently, the lines between Fourth Amendment protection from unreasonable searches and schools' rights to ensure safety are somewhat blurry. *Vernonia* indicates the districts' right to conduct drug testing of student-athletes in order to protect their security and safety, but, as noted above, other cases indicate that districts certainly do not have unlimited latitude in implementing such policies. A clearer picture of school district policies in Texas will illuminate larger trends in drug testing among school districts in the United States.

This paper offers the comprehensive results from research analyzing the current student drug-testing policies of all 1056 Texas public school districts. The question as to whether random suspicionless drug testing of students will continue to be upheld in light of the Fourth Amendment is one to which the answer remains unknown. With court decisions conflicting on this very question, school administrators, attorneys, and other concerned parties may receive clearer guidance as to the legal ambiguities concerning this issue. In the meantime, this analysis can contribute to an improved understanding of what Texas school districts' policies currently require and how these actions comply with the relevant law.

Methodology

According to the Texas Education Agency (2000), there are currently 1056 independent school districts in the state of Texas. This figure does not include charter school districts or common school districts. One survey, with a postage paid return envelope, was mailed to the superintendent of each public independent school district in Texas. With the availability of resources through the Texas Education Agency, every public school district in Texas was included in this study.

The survey instrument used in this study was developed with the assistance of an expert panel of educational leadership professors trained in school law. Field testing was conducted to establish content and construct validity. Specifically, this survey sought the following data:

1. Does your school district currently drug test students?
2. Is this student drug testing restricted to certain populations of students?
3. How long has this policy been in place?
4. To your knowledge, has this policy been challenged?
5. If so, in what manner was the policy challenged?
6. If so, what was the outcome of this challenge?
7. If your district does not have a student drug testing policy, do you anticipate that your district will implement one in the future? Why or why not?

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[7] N. Flatt-Moore, *Public schools and urinalysis: Assessing the validity of Indiana Public Schools' student drug testing policies after Vernonia*. 1998 BYU Educ. & L. J. 239.
[8] J. Mackay, *Testy: An Azle mom isn't high on her daughter being drug-tested. Neither is the ACLU*. 25 Texas Monthly 24.
[9] *Gardner v. Tulia Independent School Distric,t*2000 U.S. Dist. LEXIS 20253 (W.D. Tex.); *Tannahill v. Lockney ISD*, 133 F.Supp.2d 919 (W.D. Tex. 2001).

Additionally, the survey requested a copy of school board policy FNF, legal and local, which addresses student drug testing issues (Most school district policy manuals in Texas are written in collaboration with the Texas Association of School Boards [http://www.tasb.org]). These data were collected beginning in January, 2001. A second mailing of the survey was conducted in April, 2001, to request responses from those districts who had not yet returned their surveys. All responses were entered into a database for analysis.

Results/Conclusions

Of the 1056 public school districts in Texas, 827 returned their surveys from either the first or second mailing; thus, the response rate for the survey was 78.3%. Of these responses, 658 (20.4%) superintendents indicated that their school district does not currently implement a student drug-testing policy; while 169 (79.5%) respondent school districts do implement some type of student drug-testing policy. These results are displayed in Table 1.

Table 1

Student drug-testing policies in Texas school districts

N=827

Policy in place	Number of districts	Percentage
Yes	169	20.4
No	658	79.5
	827	99.9

Note: Percentages do not sum to 100 due to rounding.

Table 2 displays the types of student populations subjected to drug testing among the 20% of Texas school districts which have drug testing policies. An examination of the responses to the remaining survey questions presents a number of interesting findings. Students involved in extra-curricular activities make up the most-often tested population, followed by student athletes. Drug-testing policies for these student populations comprise more than three-fourths of all the public school drug-testing policies in Texas. All students are drug-tested in 28 of respondent districts, the same type of policy that was recently invalidated by the district court in *Tannahill*. Of these 28 districts implementing mandatory testing, 12 happen to be state-supported group homes or correctional facilities, including Windham School District, the Texas prison education system. Mandatory drug testing of students in these correctional facilities is legal, but clearly the policies for testing all students currently implemented in the remaining 16 districts are somewhat far-reaching in light of the *Gardner and Tannahill* rulings. Three districts indicated a student testing population of "other," which in all three cases referred to students who drive motor vehicles to or from school. Nine districts indicated that their student drug-testing policies are completely voluntary for students. Thus, more than three-fifths of Texas districts that currently drug test students go beyond what the Supreme Court approved in *Vernonia*.

Table 2

Secondary student populations included in drug-testing policies.

N=169

Student population	Number of districts	Percentage
Student athletes	53	31.4
Students in extra-curricular activities	76	45.0
All students	28	16.6
Other	3	1.8
Voluntary testing only	9	5.3
Total	169	100.1

Note: Percentages do not sum to 100 due to rounding.

Table 3 displays responses from the third question in this survey, which asked districts who did have student drug-testing policies how long that policy had been in place. Available responses included less than one year, one to five years, five to ten years, and more than ten years. Drug testing polices had been in place less than one year for 22 of the 169 districts, or 13% of respondents. The majority of policies had been in place for one to five years, which comprised 71.6% of the results, or 121 districts. Nine districts, or 5.3%, have policies that have been in place for five to ten years. Worth noting is the fact that of the 16 districts with policies over 10 years old, 12 of these schools are state-supported correctional facilities or homes. One district failed to indicate how long their policy had been in place. It is clear that the implementation of drug-testing policies in Texas school districts proliferated as a result of the *Vernonia* decision.

Table 3

Years of implementation of drug-testing policies.

N=169

Number of years	Number of districts	Percentage
Less than one	22	13.0
One to five	121	71.6
Five to ten	9	5.4
More than ten	16	9.5
No response	1	
Total	169	100.0

Perhaps the most interesting question on the survey was question four, which asked districts that have a student drug-testing policy if said policy had ever been challenged. These responses are displayed in Table 4. A few districts responded that parents had questioned the policy or even taken complaints to the school board, but only four districts out of 169 positive responses indicated that their policy had been legally challenged. These four districts represent a mere 2.4% of drug testing policies in Texas schools that have been challenged in the courts. Of these four districts, two failed to offer any explanation of their challenge. The remaining two districts whose policies had been challenged were currently awaiting court decisions. Table 4 displays the data gathered for question 4.

Table 4

Student drug-testing policies that have been challenged

N=169

Policy challenged	Number of districts	Percentage
Yes	4	2.4
No	165	97.6
Total	169	100.0

The final question of the survey was directed to those districts who do not currently have a student drug testing program in place. This question asked if the district anticipated implementing such a policy in the future. Surprisingly, 69 districts (of 658 districts with no such current policy) expressed that they do plan to implement such a policy in the future. Thus 10.5% of districts in Texas that are currently not drug testing students plan to do so at a later date. In light of the two Texas school policies in Lockney and Tulia that have recently been struck down by federal courts, 10.5% may be considered a seemingly high percentage.

Table 5

Student drug-testing policies planned for future implementation.

N=658

Policy planned for future	Number of districts	Percentage
Yes	69	10.5
No	589	89.5
Total	658	100.0

District Size and Drug Testing Policies

An analysis of the size of the school districts that are currently implementing random, suspicionless drug-testing of students revealed interesting data. Of the 169 districts that engage in such a practice, 12 are state-sponsored schools for juvenile offenders or troubled children; thus, these districts are likely required by law to drug test many of their students and therefore their results are not included in these totals. Of the remaining 157 districts, over 20% (33 districts) are so small that the entire district has an enrollment of less than 500 students. The largest number of drug testing policies appeared in districts having 500-999 students (39 districts, 25%). Ninety-six of the districts, or over 61% of the total number, had less than 1500 students enrolled.

On the other side of this trend, only eight of 157 districts that currently have student drug testing policies had enrollments of 10,000 students or more. Four of these eight had policies that were strictly voluntary for students. Only one district with an enrollment larger than 30,000 students had such a policy; this student drug testing policy was voluntary and thus not required for any students to comply.

These data have interesting implications. Among the respondents to this survey, a great number of districts that currently require drug testing of students (or particular student groups) are quite small in size. Furthermore, an extremely small number of large school districts require any drug testing of students. In light of the courts' recent decisions in student drug testing cases (such as *Tanahill v. Lockney* and *Gardner v. Tulia*), and upon waiting for the Supreme Court's decision in Earls, apparently larger districts do not engage in student drug testing as frequently as smaller districts. Perhaps larger districts, who typically employ their own school attorney(s) rather than having a firm on retainer for legal advice may be more aware of judiciary decisions on student drug testing policies; these locally employed attorneys may offer stronger advice against implementing such policies in light of current precedents. Or perhaps the school and community culture of smaller school districts is for some reason more conducive to acceptance of such policies. A follow-up study to examine the reasons for the difference in the number of large districts implementing drug testing policies as opposed to small districts is needed and should offer interesting results.

District Location and Drug Testing Policies

Another interesting trend found in the respondents who currently have student drug testing policies is the fact that over 27% of the "yes" responses came from districts located in the geographic boundaries of regional Education Service Center (ESC) VII. This ESC is primarily made up of rural districts that are fairly small in size. Service Centers that serve more urban districts tended to have much smaller numbers of schools with drug testing policies; for example, Region IV serving the greater Houston area had only 3 districts that indicated they have such policies, accounting for a mere 1.9% of the districts with drug testing policies. A further examination of this trend and its implications is also warranted.

Individual responses generated by the surveys also yielded a variety of unique responses not specifically asked for by the survey questions. For example, one district indicated that their drug testing procedures were highly unique because they tested using hair samples rather than urinalysis. Given that the

obtrusiveness of the search procedures was an important component of Vernonia and most other student drug-testing cases, this alternative approach to urinalysis is quite interesting. Another interesting remark was made on one survey explaining that their student drug-testing policy was spelled out in the school's athletic code only; no procedures or guidelines appear in district policy. Students are subjected to testing if there is a suspicion of drug use; no testing is conducted regularly or randomly. Such a "policy" comports more with *TLO*, and might not even be considered a policy in the tightest sense of the term. Future research on these and other unique qualities of the survey results should be conducted. Likewise, results of the survey data above will be broken down according to the size of respondent districts – do student drug testing policies occur more often in larger or smaller districts, in urban or rural locations, in a certain geographic area of the state?

As the data gathered for this study indicate, student drug testing policies are not uncommon in Texas public schools. With recent decisions in the *Tulia* and *Lockney* cases favoring students' rights over schools' power to require such testing, challenges of additional school policies seem likely. Clearly the courts are indicating that school districts must have fairly compelling reasons to infringe upon students fourth amendment rights. Important to note is the fact that the challenges these districts are beginning to face indicate an apparent trend by the courts to reign in school districts who are taking *Vernonia* as a license to implement expansive policies. The Supreme Court will soon revisit the issue of random suspicionless drug testing of students when it rules on *Board of Education v. Earls*,[10] a 10th Circuit case from Oklahoma in which drug testing of students in any extra-curricular activities was determined to be unconstitutional. A decision is expected by the end of June, 2002.

[10] 122 S. Ct. 509; 151 L. Ed. 2d 418 (2001).

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